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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 267

MERLE R. SCHNECKLOTH, Superintendent, California Conservation Center, and ROBERT BLIESSNER,

Petitioners,

vs.

HAROLD ARTHUR HILL,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on March 11, 1970.

CITATIONS TO OPINIONS BELOW

The judgment of the Court of Appeals, not yet reported, appears in Appendix A hereto. The memorandum opinion of the United States District Court, Eastern District of California, not reported, appears in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 11, 1970. A timely petition for rehearing and rehearing en banc was denied April 13, 1970. A timely motion for stay of mandate was granted and filed April 21, 1970, and this petition for certiorari was filed within 90 days of the denial of the petition for rehearing and rehearing en banc. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

STATUTES AND RULES INVOLVED

United States Code, Title 42:

§ 1983. Civil action for deprivation of rights.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

United States Constitution:

Amendment VIII, § 1.

"Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Federal Rules of Civil Procedure:

Rule 12(b)—Defenses and objections—When and how presented—by pleading or motion, motion for judgment on the pleading.

"Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

* * *

"(6) To dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

QUESTION PRESENTED

Does a noninjurious simple assault of a state prisoner constitute cruel and unusual punishment as proscribed by the Eighth Amendment thereby stating a cause of action under 42 U.S.C. section 1983?

STATEMENT OF THE CASE

Respondent, presently a prisoner at the California State Prison in Chino, California, filed a complaint under the Civil Rights Act, 28 U.S.C.A. section 1343 and 42 U.S.C. section 1983.

Respondent, in his complaint, alleges that while he was performing his duties as a tailor, Robert Bliessner,[1] a civil service employee at the California State Prison at Susanville, California, issued a single kick to respondent's posterior. Although he did not suffer any injury thereby, respondent alleges that the act violated his constitutional right to privacy and to be protected from cruel and unusual punishment.

The United States District Court for the Eastern District of California granted petitioners' motion to dismiss the complaint for failure to state a claim upon which relief can be granted (see Appendix B). After denying respondent's motion for reconsideration (Appendix C), that Court granted respondent's motion to file notice of appeal in forma pauperis and amended its order to dismiss the action rather than the complaint (Appendix D).

The order of the District Court dismissing the action was reversed by the Court of Appeals (see Appendix A). This latter ruling had the effect of bringing an alleged simple assault within the ambit of those rights secured through the Eighth Amendment of the Constitution which prohibits cruel and unusual punishment.

[1] Respondent included Merle R. Schneckloth, Superintendent at the California Conservation Center at Susanville, California, as a party defendant. This joinder is improper since the doctrine of respondeat superior is inapplicable to prison officials (*Salazar* v. *Dowd*, 256 F.Supp. 220 (D.C. Colo. 1956), *Jordan* v. *Kelly*, 223 F.Supp. 731 737–739 (W.D. Mo. 1963); *Runnels* v. *Parker*, 263 F.Supp. 271, 274 (C.D. Cal. 1967)).

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

I. A Substantial Constitutional Question Is Raised by the Ruling of the Court Below Which Places an Erroneous Interpretation on the Eighth Amendment to the Constitution by Bringing Within the Ambit of the Proscriptions of That Amendment a Noninjurious Assault of a Prisoner

The alleged act was not punishment and respondent does not allege that it was. Such alleged corporal punishment is unlawful pursuant to California Penal Code sections 673, 2650, 2651, 2652, and 2653 (see Appendix E) and specifically proscribed by Rules of the Director of Corrections (see Appendix F). In the course of imprisonment and rehabilitative programs (such as that in which respondent was employed) prisoners, of necessity, are placed in an environment in which ordinary men are faced with tense prison situations where simple noninjurious assaults, which are neither authorized nor administered as punishment per se, may occur. The Civil Rights Act was not intended to afford redress for such isolated instances as those alleged by respondent.[2]

Section 1983 of Title 42 U.S.C. remains virtually unchanged in its wording since it became a part of the bill to enforce the provisions of the Fourteenth Amendment enacted in 1871 under the popular name of the Klu Klux Act.[3] Succeeding legislatures have not only left the section unscathed, but have failed

[2] *Cullum* v. *Department of Corrections*, 267 F.Supp. 524 (N.D. Cal. 1967).

[3] *Congressional Globe*, 42nd Congress.

to include a discussion of this particular section in debates on the 1957 and 1964 Civil Rights Legislation.

There does appear some comment which would lead us to believe that the solons of that day wanted to reserve this legislation for only those truly serious acts of constitutional dimensions. Senator Thurman of Ohio was quite concerned about the original form of the bill which would have encompassed conspiracy to commit relatively minor crimes within the Federal Court jurisdiction.[4] This language did not appear in the final form of the bill.[5]

This same philosophy came through in the 1957 Civil Rights Law which was primarily concerned with voting rights. Under part III of the bill as originally introduced, the Attorney General would be empowered to bring suit on behalf of persons whom he felt had been deprived of any constitutional right enforceable through the Fourteenth Amendment. One of these protected rights specifically enumerated was the right to be free from brutality at the hands of prison officials.[6] This portion of the bill was amended out.[7]

In 1964 Title III of the bill again contained such a power vested in the Attorney General and was

[4] Ibid pp. 216, 217.
[5] *Revised Statutes of the United States*, Second Edition pp. 347–349 § 1979 et seq.
[6] *Congressional Quarterly Almanac*, 1957 p. 566.
[7] Ibid p. 564.

again amended out.[8] This left the legislation concerned primarily with public accommodations and authorized the Attorney General to intervene in private suits only where the action pertained to a denial of equal protection because of race, color or national origin.[9] It is impossible to perceive how these legislators could envision that the Civil Rights Laws would encompass acts which are statutorily defined only as a petty offense (18 U.S.C. §§ 1, 113(e)). The Constitution is a mighty instrument which has served as a bulwark in our democracy; it should not be demeaned by interpretations which bring within its scope the most minor transgressions.[10]

Brutality as a course of conduct within state prisons has been excised through this vehicle. *Jackson* v. *Bishop*, 404 F.2d 571, 573–575 (8th Cir. 1968); *Talley* v. *Stephens*, 247 F.Supp. 683 (E.D. Ark. 1965). This is as it should be, but there must be a showing of the deprivation of a constitutional right in order for a cause of action to be bottomed on 42 U.S.C. section 1983. *Monroe* v. *Pape*, 365 U.S. 167, 171 (1961), 5 L.Ed.2d 492, 81 S.Ct. 473. *Robinson* v. *State of California*, 370 U.S. 660 (1962), 8 L.Ed2d 758, 82 S.Ct. 1417. The pertinent constitutional right in this instance is alleged to be cruel and unusual punishment proscribed by the Eighth Amendment.

[8] *Congressional Quarterly Almanac*, 1964, pp. 363–364; *U.S. Code, Congressional and Administrative News*, 88th Congress—Second Session No. 11, pp. 1822–1823, 1840–1841.

[9] Ibid p. 346.

[10] At least one Federal District judge has characterized such an isolated act as a "trivial battery." *Daly* v. *Pedersen*, 278 F. Supp. 88, 94 (1967).

This Court has evolved certain guidelines to aid in the determination of what constitutes cruel and unusual punishment. Specifically, this is wanton infliction of pain (*Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459, 463 (1947), 91 L.Ed. 422, 67 S.Ct. 374), disproportionate to the offense charged (of tormenting severity) (*Weems* v. *United States*, 217 U.S. 349 (1910), 54 L.Ed. 793, 30 S.Ct. 544), and inhuman or barbarous punishment which is manifestly cruel. *In re Kemmler*, 136 U.S. 436 (1890), 34 L.Ed. 519, 10 S.Ct. 930. The standards were summed up by this Court in *Trop* v. *Dulles*, 356 U.S. 86, 100 (1957), 2 L.Ed.2d 630, 78 S.Ct. 590 (1957):

> "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the state has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards."

Petitioner submits that the acts complained of in respondent's complaint fall far short of bringing his treatment while in prison within the guidelines set within this Court for determining what is cruel and unusual punishment. His incarceration and treatment certainly fall within the limits of civilized standards.

The ruling of the court below (see Appendix A) placed the noninjurious simple assault alleged by respondent within those cruel and unusual punishments proscribed by the Eighth Amendment. Placed in the historical context of the time when this amend-

ment was enacted, and even conceding an evolutionary judicial concept of the Eighth Amendment (see *Trop* v. *Dulles, supra,* 356 U.S. 86), such an interpretation is unwarranted and can only serve to completely obliterate present guidelines set by this Court pertaining to cruel and unusual punishment.

A. HISTORY OF CRUEL AND UNUSUAL PUNISHMENT

When the amendment was enacted times were hard and punishment was hard as well. The only debate on the amendment in the House of Representatives was that the terms "cruel" and "unusual" were too indefinite.[11] Mr. Livermore spoke of the need for such corporal punishments as hanging, whipping and mutilation.[12] His views were perhaps influenced by his experience as a Judge Advocate in the Admiralty Court and Attorney General in the English Court System.[13]

The earliest mention of cruel and unusual punishment appeared in the dissenting opinion of the punishment prescribed for Titus Oates in 1685.[14] He had been convicted of perjury and was sentenced to imprisonment for life and corporal punishment as well, such as being pilloried and then whipped from Newgate to Tyburn and from Allgate to Newgate.[15] A comment on the case stated that "This was thought

[11] *Annals of Cong.* I 782–783.
[12] Ibid.
[13] *Dictionary of American Biography,* 1928.
[14] 10 Howell State Trials.
[15] The distance from Allgate to Newgate was relatively short (two or three blocks), but from Newgate to Tyburn was close to four miles. (See *The New World Atlas* and *Gazetteer,* 1922.)

too little if he [Oates] was guilty and too much if innocent, 1 Burnet 637." [16] In 1730, Emlyn wrote in his preface to 1 Howell State Trials "... that fine which would be a mere trifle to one man, may be the undoing and utter ruin of another; and those marks of ignominy and disgrace, which would be shocking and grievous to a person of liberal education would be slighted and despised by one of the vulgar sort. A judge therefore who uses this discretionary power to gratify a private revenge, or the rage of a party, by inflicting indefinite and perpetual imprisonment, excessive and exorbitant fines, unusual and cruel punishment, is equally guilty of perverting justice and acting against law, as he, who in a case, where the law has ascertained a penalty, wilfully and knowingly varies from it." [17] Emlyn goes on to state that cruel butcherings, mutilation and branding should be abolished.[18]

Such feelings undoubtedly were the basis for the tenth article of the English Bill of Rights enacted in 1689 from which our Eighth Amendment is copied verbatim.[19] However, corporal punishment was condoned and in fact was the exclusive method of punishment used in the American colonies until the late 18th and early 19th Century.[20]

The colonists sentenced offenders to the pillory, mutilation and branding for such seemingly minor

[16] 10 Howell State Trials 1079.
[17] 1 Howell State Trials XXXV.
[18] Ibid.
[19] *Constitution of the United States*, Edward Dumbald 1964, p. 12.
[20] *The Story of Punishment*, Harry Elmer Barnes, 1930, p. 104.

offenses as practicing the Quaker religion.[21] Furthermore, many punishments which were originally intended only to hold a person up to public ridicule, and not to inflict physical pain, were brutalized. For instance, a person placed in the pillory (originally intended only to make known to the populace persons who could not be trusted) would often have his ears nailed to the pillory and the jeering mobs inflicted grievous injuries by throwing everything from rotten vegetables to rocks at the person pillorized.[22]

It may be presumed that our forefathers who enacted the Bill of Rights were very much aware of the punishment for treason since many of them would have been liable for that crime had our fight for independence proved unsuccessful. The usual punishment in English courts for treason[23] was that the malefactor be hung, but not until dead; his private parts cut off and his bowels torn out and burned before him; his head cut off and his body quartered.[24]

All of the above brutal punishments qualify as

[21] *Curious Punishments of Bygone Days*, Alice Morse Earle, 1896.
[22] *The Story of Punishment* by Barnes, 1930.
[23] *The History of English Law*, Pollock and Maitland Vol. II, page 470, defines treason as (1) to compass a seal or imagine the death of a king, his queen or eldest son; (2) to defile the king's wife or his eldest unmarried daughter or his eldest son's wife; (3) to levy war against the king and his realm; (4) to be adherent to his enemies, giving them aid and comfort; (5) to counterfeit the king's great or privy seal or more money; (6) to bring false money into the realm; (7) to slay certain officers or justices being in their place doing their offices. Imagination was synonymous with plot.
[24] *Legal Antiquities*, Edward J. White, 1913.

"cruel" and "unusual" punishments.[25] Tortures such as those popular during the Inquisition also came within these definitions but were largely used as a part of the fact finding process and not as punishment.[26]

Another punishment fresh in the minds of those who enacted our Bill of Rights was that of transportation. This was a refined form of banishment and was usually meted as an alternative punishment for the 222 capital crimes in English law at that time. It is estimated that between fifty and one hundred thousand persons were sent to America under this punishment. Untold thousands during this time were also sent to the Australian penal colonies under this sentence. The thought of removing a person from his homeland and family and sending him in bondage to a foreign land could be most cruel.[27] (cf. *Trop* v. *Dulles*, 356 U.S. 86)

Bilboes, ducking stools, branks, and tongues run through with a hot iron[28] were other forms of punishment popular in that era which could also be classed as cruel and unusual. Modern punishment techniques such as "brain washing" imposed on prisoners of war in the Korean War by the Chinese furnish an example of cruelty in the Twentieth Cen-

[25] "Cruel" is defined in the *Oxford English Dictionary* (1933) as "destitute of kindness or compassion; merciless, pitiless, hard-hearted or proceeding from or showing indifferences to or pleasure in another's distress." "Unusual" is defined in the same work as "uncommon or exceptional."

[26] *History of the Inquisition of the Middle Ages*, Henry Lea, 1888.

[27] *The Story of Punishment*, Barnes, 1930.

[28] *Curious Punishments of Bygone Days*, Alice Morse Earle.

tury [29] which were borrowed from the Inquisition.[30] It should be remembered, however, that the Eighth Amendment does not proscribe all punishment, only that punishment which is cruel and unusual. The examples given above, although not all inclusive, are cruel and unusual.

To hold that an unauthorized and noninjurious simple assault of a prisoner constitutes deprivation of that prisoner's Eighth Amendment rights will render as completely meaningless the words "cruel" and "unusual" that this Court has so painstakingly defined in *Kemmler*,[31] *Trop*,[32] *Weems*[33] and *Resweber*.[34]

Justice Douglas of this Court stated in *Screws* v. *United States*, 325 U.S. 91, 108–109 (1945); 89 L.Ed. 1495, 65 S.Ct. 1031:

> ". . . The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States. Cf. *Logan* v. *United States*, 144 U.S. 263, dealing with assaults by federal officials. The Fourteenth Amendment did not alter the basic relations between the States and the national government. *United States* v. *Harris*, 106 U.S. 629; *In re Kemmler*, 136 U.S. 436, 448. Our national government is one of delegated powers alone. Under our federal system the admin-

[29] *Justice and Injustice*, Edward Burglar, M.D., and Joost Am Merlov, M.D., 1963.
[30] *History of the Inquisition of the Middle Ages*, Henry Lea, 1888.
[31] *In re Kemmler*, 136 U.S. 426.
[32] *Trop* v. *Dulles*, 356 U.S. 86.
[33] *Weems* v. *United States*, 217 U.S. 349.
[34] *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459.

istration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States. *Jerome* v. *United States*, 318 U.S. 101, 105. As stated in *United States* v. *Cruikshank*, 92 U.S. 542, 553–554, 'It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself.' And see *United States* v. *Fox*, 95 U.S. 670, 672. It is only state action of a "particular character" that is prohibited by the Fourteenth Amendment and against which the Amendment authorizes Congress to afford relief. *Civil Rights Cases*, 109 U.S. 3, 11, 13."

Petitioner submits that the isolated noninjurious simple assault alleged in respondent's complaint is not the type of action the Civil Rights Act was intended to relieve and that the constitutional proscription against cruel and unusual punishment will suffer irreparable harm by the interpretation placed on it by the Court below.

II. The Ruling Below That Noninjurious Simple Assault on a Prisoner States a Cause of Action Under the Civil Rights Act Will Result in a Stultifying Workload Imposed on the Federal District Courts

This Court is well aware of the efficient communications existing between and among the various state and federal prisons. Once it becomes known in these prison communities that an unauthorized simple assault which results in no injury states a cause of ac-

tion under the Civil Rights Act, the resulting increase in civil rights complaints averring noninjurious simple assaults by prison officials and other prisoners will inundate the federal courts which are already overburdened by prisoner petitions.

That such an overburdened condition exists is demonstrated by the following statement from the 1967 Annual Report of the Director of the Administrative Office of the United States Courts:

> "The strong upward trend of recent years in the number of petitions filed by state and federal prisoners in the United States District Courts continued in 1967. . . . Numerically the largest increase occurred in the filing of petitions against state and federal prison officials involving conditions of detention and the enforcement of civil rights. *Cases of this type brought against federal officials increased 62% in 1967 and cases against state officials increased 80%.* . . . One out of every seven civil actions commenced in the district courts during 1967 was a prisoner petition." (Emphasis added.) [35]

This trend has continued and in 1969 one out of every six civil cases filed in the district courts was a prisoner petition.[36] During the five years between 1964 and 1969 habeas corpus petitions filed in the federal district courts increased by 90%, while other prisoner petitions (where civil rights actions are

[35] The Administrative Office of the United States Courts, Annual Report of the Director, 1967, pp 11–55.

[36] The Administrative Office of the United States Courts, Annual Report of the Director, 1969, pp 11–52.

classified) increased by 309%.[37] The phenomenal increase in such filings is made all the more significant by the fact that the prison population in the United States has, since 1961, decreased.[38] Although recent national figures are unavailable, the trend can be readily seen to be continuing by figures which show the California prison population declined by almost 5% during 1969,[39] while the population of the State of California increased by 1.5%.[40]

It is, then, readily apparent that the opening of an avenue of recourse so appealing to prisoners as simple, noninjury assault would create a litigious flood in an already overburdened area.

This Court is in a unique position to take judicial notice of the fact that prisoner petitions are, more often than not, difficult to read and understand.[41] Because of this fact it takes time to ferret out the valid from the invalid claims. Spurious claims should be dismissed to allow full attention to be given to those claims having merit. It is axiomatic that the courts, with increased prisoner petition caseloads, cannot give the time to these petitions they have in the past when there were fewer such filings. Therefore, the rights of those with valid claims are diluted.

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[37] The Administrative Office of the United States Courts, Annual Report of the Director, 1969, pp. 11–53.

[38] Statistical Abstract of the United States, 1969, page 154.

[39] State of California Human Relations Agency, Department of Corrections Report, January 23, 1970.

[40] State of California Department of Finance, California Population 1969.

[41] *Johnson* v. *Avery*, 393 U.S. 483, 488.

The federal courts have been zealous and dedicated in their efforts to protect the constitutional rights of prisoners. These courts have safeguarded prisoners from racial discrimination, guaranteed them access to the courts, and protected them from having cruel and unusual punishments inflicted.

The ability of the courts to apply meaning to those constitutional rights guaranteed prisoners has been largely due to definitive guidelines set forth by the decisions. Anytime these guidelines are made hazy or obliterated entirely by a decision of a federal circuit court, it creates a problem of such magnitude as to affect all federal district courts and circuit courts of appeal.

III. The Decision Below Conflicts With the Decisions of Other Courts of Appeal Which Hold That Isolated Instances of Assault and Battery Upon a Prisoner Do Not, Standing Alone, State a Claim Under the Civil Rights Act

An assault is concededly an intentional tort,[42] however the Third Circuit Court of Appeals in *Kent* v. *Prasse*, 385 F.2d 406, 407 (3d Cir. 1967), held "Nor are we able to perceive that a tort committed by a state official acting under color of law is, in and of itself, sufficient to show an invasion of a person's right under the [Civil Rights] Act."

Isolated assaults on state prisoners were also held not actionable under the Civil Rights Act by the Seventh Circuit Court of Appeals in *Knight* v. *Bibb*,

[42] *Handbook of the Law of Torts*, William L. Prosser, §§ 9, 10.

250 F.2d 283 (7th Cir. 1957), and *United States ex rel. Atterbury* v. *Ragen*, 237 F.2d 953, 956 (7th Cir. 1956), *cert.den.* 353 U.S. 964 (1957).

In a recent case alleging a far more serious assault than that alleged by respondent in this case, the Eighth Circuit Court of Appeals stated:

> "State officials can only be held accountable under the Civil Rights Act, supra, in the federal courts for conduct and actions taken pursuant to their official duties and where a clear showing is made of a violation of some federal constitutional right. Some of the authorities previously considered hold that an assault by a law enforcement officer, in and of itself, does not raise an action under the Civil Rights Act, and, specifically, that alleged assaults by state prison officials, without any showing of a constitutional violation, are matters for consideration of internal prison discipline of interest solely to the state and actionable, if at all, in the state courts. We think those authorities are clearly applicable to the facts involved in the instant case." *Cole* v. *Smith*, 344 F.2d 721, 724 (8th Cir. 1965).

The above cited cases are patently in conflict with the decision below in the instant case. The absence of a constitutional right of a prisoner to be free from such isolated assaults is supported by the opinion of Justice Douglas in *Williams* v. *United States*, 341 U. S. 97, 104 (1951), 95 L.Ed. 774, 71 S.Ct. 576, in which an instruction given by the trial court was held to be correct in stating that defendants were

being tried for coercing confessions by means of assaults rather than for the assault themselves.

The conflicts between the decisions of the Third, Seventh and Eighth Circuits and that reached by the court in its decision below (see Appendix A) justify the grant of certiorari to review the judgment below.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HAROLD ARTHUR HILL,
Appellant,

v.

MERLE R. SCHNECKLOTH,
Superintendent, et al.,
Appellees.

No. 23858

ORDER

Before: HAMLEY, HUFSTEDLER and WRIGHT, Circuit Judges

It appearing to the Court that the complaint herein states a claim under 42 U.S.C. § 1983 upon which relief can be granted (see *Wiltsie* v. *California Department of Corrections*, 406 F.2d 515 (9th Cir. 1968), and *Brown* v. *Brown*, 368 F.2d 992 (9th Cir. 1966)), the judgment dismissing the action for failure to state a claim is reversed and the cause is remanded to the district court for further proceedings.

United States Circuit Judges

Original
Filed
Dec. 6, 1968
Clerk, U.S. Dist. Court
Eastern District of California

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

—oOo—

HAROLD ARTHUR HILL,
Plaintiff,

v.

MERLE R. SCHNECKLOTH, Warden, ROBERT BLIESNER, Storekeeper III,
Defendants.

Civ. S-828

MEMORANDUM AND ORDER

Plaintiff is a prisoner at the California State Prison in Folsom, California. He brought a civil rights action under 42 U.S.C.A. § 1983. His complaint alleges that he was kicked "within the anus" by civil service prison employee Robert Bliesner. Defendants have moved for a dismissal for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

While this court does not condone wanton acts of violence against prisoners such as is here alleged, the act complained of did not violate the constitutional rights of plaintiff. *Cf. Jordan* v. *Fitzharris*, 257 F. Supp. 674, 679 (N.D. Cal. 1966). *See also Travers* v. *Paton*, 261 F. Supp. 110, 115–16 (D. Conn. 1966).

IT IS THEREFORE ORDERED that defendants' motion to dismiss the complaint for failure to state a claim upon which relief can be granted be, and the same is, hereby granted.

DATED: December 6, 1968.

/s/ THOMAS J. MACBRIDE
United States District Judge

Original
Filed
Jan. 7, 1969
Clerk, U.S. Dist. Court
Eastern District of California

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

—oOo—

HAROLD ARTHUR HILL,
Plaintiff,

v.

MERLE R. SCHNECKLOTH, Warden, ROBERT BLIESNER, Storekeeper III,
Defendants.

Civ. S-828

MEMORANDUM AND ORDER

On December 6, 1968, this court filed a Memorandum and Order dismissing plaintiff's civil rights complaint on the ground that it failed to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff now moves for reconsideration of that decision.

A careful reading of plaintiff's motion discloses that it fails to raise any matter not previously considered. The motion is therefore denied.

IT IS SO ORDERED.

DATED: January 7, 1969.

s. THOMAS J. MACBRIDE
United States District Judge

Original
Filed
Jan. 17, 1969
Clerk, U.S. Dist. Court
Eastern District of California

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

—oOo—

HAROLD ARTHUR HILL,
Plaintiff,

v.

MERLE R. SCHNECKLOTH, Warden, ROBERT BLIESNER, Storekeeper III,
Defendants.

Civ. S-828

MEMORANDUM AND ORDER

Petitioner filed a civil rights suit under 42 U.S.C. § 1983. By order filed December 6, 1968, this court dismissed the complaint for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. That order should be amended to dismiss the action rather than the complaint. A reconsideration was denied.

Petitioner now seeks permission to file a notice of appeal in forma pauperis. I am of the opinion that the appeal is taken in good faith and that permission should be granted. *Compare Wiltsie* v. *California Department of Corrections, et al.*, 9th Cir. No. 22380, December 31, 1968.

IT IS THEREFORE ORDERED that the previous order in this case filed on December 6, 1968, be amended to read: "IT IS THEREFORE ORDERED that defendant's motion to dismiss the action for failure to state a claim upon which relief can be granted be, and the same is, hereby granted."

IT IS FURTHER ORDERED that petitioner be allowed to file a notice of appeal of that order in forma pauperis.

DATED: January 17, 1969.

/s/ THOMAS J. MACBRIDE
United States District Judge

APPENDIX E

California Penal Code

Section 673. "[Cruel and unusual punishments in reformatories, etc.: Acts prohibited: Grade of offense.] It shall be unlawful to use in the reformatories, institutions, jails, state hospitals or any other state, county, or city institution any cruel, corporal or unusual punishment or to inflict any treatment or allow any lack of care whatever which would injure or impair the health of the prisoner, inmate, or person confined; and punishment by the use of the strait jacket, gag, thumbscrew, shower bath or the tricing up of a prisoner, inmate or person confined is hereby prohibited. Any person who violates the provisions of this section or who aids, abets, or attempts in any way to contribute to the violation of this section shall be guilty of a misdemeanor."

Section 2650. "[Unlawfulness of injury to person.] The person of a prisoner sentenced to imprisonment in the State prison is under the protection of the law, and any injury to his person, not authorized by law, is punishable in the same manner as if he were not convicted or sentenced."

Section 2651. "[Limitation on authority to punish.] No punishment, except as may be authorized by the Director of Corrections, shall be inflicted and then only by the order and under the direction of the wardens. Nothing in this section shall be construed as a limitation or impairment of the authority of the Adult Authority in exercising its functions."

Section 2652. "[Unlawful punishments: Violations of section.] It shall be unlawful to use in the prisons, any cruel, corporal or unusual punishment or to inflict any treatment or allow any lack of care

whatever which would injure or impair the health of the prisoner, inmate or person confined; and punishment by the use of the strait jacket, gag, thumbscrew, shower-bath or the tricing up of prisoners, inmates or persons confined is hereby prohibited. Any person who violates the provisions of this section or who aids, abets, or attempts in any way to contribute to the violation of this section shall be guilty of a misdemeanor."

Section 2653. "[Punishment for wilful inhumanity, etc.] Every person who is guilty of wilful inhumanity or oppression toward any prisoner in a State prison and under his care or in his custody, is punishable by fine not exceeding two thousand dollars ($2,000), and by removal from office."

APPENDIX F

STATE OF CALIFORNIA
DEPARTMENT OF CORRECTIONS

Rules of the Director of Corrections and of the Wardens and Superintendents

"D4516. USE OF FORCE. No employee shall strike or lay hands on an inmate unless it be in defense of himself, or unless it be necessary to prevent escape or serious injury to person or property or to remove an inmate to a designated place when he refuses to obey lawful orders. In such cases, only the amount of physical force necessary to accomplish the desired result is authorized. A full report, in detail, including a medical examination, shall be submitted in all such cases.

"D4517. MECHANICAL RESTRAINT. Mechanical means of physical restraint shall be used only when necessary in transporting prisoners or upon medical advice when necessary to prevent injury to the prisoner himself or to others. No mechanical means of physical restraint shall be used for punitive purposes.

"D4518. CORPORAL PUNISHMENT. No cruel or corporal punishment shall be permitted."

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